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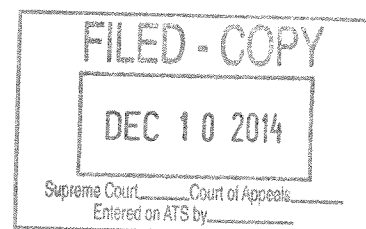
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NOS. 40898 & 40901
Plaintiff-Respondent,	)	
	)	KOOTENAI COUNTY NOS.
v.	)	CR 2009-20320 & CR 2006-34
	)	
JERRY LEONARD ELLIS, II,	)	APPELLANT'S BRIEF
	)	IN SUPPORT OF
Defendant-Appellant.	)	PETITION FOR REVIEW
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Jerry Leonard Ellis, II, respectfully requests that this Court grant review in this matter, which relates to the Idaho Court of Appeals' Opinion in *State v. Ellis*, Docket Numbers 40898 & 40901, 2014 Unpublished Opinion No.751 (Ct. App. Oct. 7, 2014) (*hereinafter*, Opinion). Review should be granted in this case, because the Opinion is inconsistent with this Court's precedent and the Court of Appeals' own precedent. In the Opinion, a majority of the Court of Appeals affirmed the district court's order revoking probation, holding that the district court did not abuse its discretion when it

denied two of Mr. Ellis' requests for a continuance of the probation revocation proceedings. One of Mr. Ellis' requests for a continuance was based on his defense counsel's claim that he was not put on notice that the probation violation admit/deny hearing would include the disposition portion of the revocation proceedings. Due to this lack of notice, Mr. Ellis' defense counsel requested a continuance in order to prepare a defense and subpoena witnesses. When the district court asked who and what the witnesses would say, Mr. Ellis defense counsel provided an offer of proof and surmised that Mr. Ellis' mother, Mr. Ellis' girlfriend, and a substance abuse sponsor would testify that Mr. Ellis was generally adhering to the terms of probation. Instead of granting Mr. Ellis' request for a continuance in order to prepare a defense and call witnesses on his behalf, the district court accepted Mr. Ellis' offer of proof as the truth then held the disposition portion of the probation revocation proceedings.

On appeal, a majority of the Court of Appeals, with Judge Lansing dissenting, held that while the district court might have denied Mr. Ellis both notice and a meaningful opportunity to prepare a defense, those errors were harmless because Mr. Ellis' witnesses' testimony would not have changed the district court's decision to revoke probation. Mr. Ellis argues that the harmless analysis in the Opinion is inconsistent with precedent from the United States Supreme Court, this Court, and the Court of Appeals. During probation revocation proceedings, a probationer has a right to notice, to prepare a defense, and to call witnesses. The procedure affirmed by the Court of Appeals, however, completely denied Mr. Ellis these rights for no reason other than an arbitrary desire to expedite the proceedings. Moreover, the harmless standard employed by the Court of Appeals is also problematic because in order to

preserve the denial of the right to call adverse witnesses on appeal, a probationer is required to provide a summary of their witnesses' potential testimony. It follows that using the probationer's offer of proof as a substitute for the witnesses' actual testimony means there is no actual right to call witnesses at a probation revocation proceeding because such a practice denies a probationer a remedy for a violation of the right to call witnesses. As such, review should be granted.

Mr. Ellis also requested a continuance in order to retain private counsel which was denied by the district court. Mr. Ellis argues that it was error for the district court to deny this request because the timing of his request, his mental instability, and the length of the requested continuance are all factors which supported that request. Additionally, there is scant evidence in the record indicating that Mr. Ellis attempted to delay or otherwise manipulate the proceedings. Moreover, Mr. Ellis' request for a continuance should not be taken lightly because the erroneous denial of the right to retain private counsel constitutes structural error.

#### Statement of the Facts & Course of Proceedings

Mr. Ellis worked late into the morning and, after he completed his job, he had five beers with his co-workers. (Presentence Investigation Report (*hereinafter*, PSI), pp.2-3.) While driving home, he nearly hit a police vehicle. (R, p.42.) The police officer activated his overhead lights, but Mr. Ellis did not yield. (R., p.42.) Mr. Ellis eventually got out of his car and ran into the woods. (R., p.42.) After a brief chase, the police officer subdued Mr. Ellis and subsequently arrested him. (R., pp.42-43.)

In docket number 40901 (*hereinafter*, First Case), Mr. Ellis was charged by information with driving without privileges, resisting and obstructing a police officer, and

driving under the influence of alcohol (*hereinafter*, DUI), with a felony enhancement for having been convicted of two prior DUIs in the previous ten years. (R., pp.70-71.) Pursuant to a plea agreement, Mr. Ellis pleaded guilty to the felony DUI and, in return, the State agreed to dismiss the remaining charges. (08/25/06 Tr., p.9, Ls.11-20; R., pp.78-81.) Thereafter, the district court imposed an indeterminate sentence of three and one-half years, but suspended the sentence and placed Mr. Ellis on probation.<sup>1</sup> (R., pp.90-93.)

After a period of probation, the State filed a report of probation violation and two addendums to that report alleging that Mr. Ellis violated the terms of his probation. (R., pp.115-117, 145-146, 162-163.) Mr. Ellis admitted to violating the terms of his probation by driving without privileges, failing to attend a relapse prevention program, residing at an unapproved residence, testing positive for amphetamine, being present at a residence where illegal substances were being consumed, lying to his probation officer, and consuming alcohol. (R., pp.115-117, 145-146, 167-169.) The district court then found that Mr. Ellis violated the term of his probation by refusing to provide a urine sample, and by failing to report to his probation officer. (R., pp.145-146, 176.) The district court revoked probation and retained jurisdiction. (R., pp.179-181.) Upon review of Mr. Ellis' period of retained jurisdiction (*hereinafter*, rider), the district court suspended the sentence and, again, placed him on probation again. (R., pp.187-191.)

After a second period of probation, the State filed a report of probation violation alleging that Mr. Ellis violated the terms of his probation. (R., pp.200-202.) Mr. Ellis admitted to violating the terms of his probation by consuming alcohol and

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<sup>1</sup> Mr. Ellis has completely served this sentence. (03/21/13 Tr., p.46, Ls.4-5.)

methamphetamine. (R., pp.200-201, 240.) The district court also found that Mr. Ellis violated the terms of his probation by failing to report to his probation officer. (R., pp.200-201, 241.) The district court continued the disposition of the probation violations. (R., p.243.)

While awaiting the disposition of the foregoing probation violations, the State filed a new case, docket number 40898 (*hereinafter*, Second Case), charging Mr. Ellis, by Information, with a felony DUI, an enhancement for previously being convicted of two felony DUIs within fifteen years, and a persistent violator enhancement. (R., pp.304-306.) Pursuant to a plea agreement, Mr. Ellis pleaded guilty to a felony DUI and the enhancement for being convicted of two felony DUIs within fifteen years, and, in return, the State dismissed the persistent violator enhancement. (R., pp.309-311.) In the First Case, the State also filed an addendum to the report of probation violation based on the charges in the Second Case. (R., pp.253-254.) Based on the guilty plea in the Second Case, Mr. Ellis admitted to violating the terms of his probation in the First Case. (R., pp.309-311.) At a consolidated hearing, the district court revoked probation and retained jurisdiction in the First Case. (R., pp.317, 320-322.) In the Second Case, the district court imposed a concurrent unified sentence of ten years, with five years fixed, and retained jurisdiction. (R., pp.317, 323-327.) Upon review of Mr. Ellis' second rider, the district court suspended the sentences and placed him on probation in both cases. (R., pp.333-346.)

After a third period of probation, the State filed, in both cases, a report of probation violation alleging that Mr. Ellis violated the terms of his probation. (R., pp.357-360.) Mr. Ellis admitted to violating the terms of his probation by consuming

alcohol, purchasing alcohol, absconding, failing to pay costs of supervision and fees, failing to report for a random drug test, and failing to report to an appointment. (R., pp.357-360, 393-394.) Mr. Ellis also admitted to violating a term of his probation by missing an aftercare appointment. (R., pp.359, 393-394.) However, the district court noted that Mr. Ellis could not attend that appointment because he was in custody. (R., pp.359, 393-394.) Mr. Ellis was admitted into mental health court while awaiting the disposition of the probation violations. (R., p.407.) The district court revoked probation in both cases, but suspended the sentences and placed Mr. Ellis on probation with a special probation condition requiring him to complete mental health court. (R., pp.409-414.)

After a fourth period of probation, the State filed, in both cases, a report of probation violation alleging that Mr. Ellis violated the terms of his probation. (R., pp.439-441.) Mr. Ellis admitted to violating the terms of his probation by failing to complete mental health court and driving without privileges. (R., pp.439-441, 449-450.) The district court revoked probation in both cases, and retained jurisdiction. (R., pp.453-454.) Upon review of Mr. Ellis' third rider, the district court again suspended the sentences and placed him on probation in both cases. (R., pp.463-468.) Mr. Ellis was also placed into mental health court. (R., pp.463-501.)

During Mr. Ellis' fifth period of probation, an arrest warrant was issued on February 28, 2013, alleging that Mr. Ellis had violated the terms of his probation. (R., p.501.) The following day, Mr. Ellis was arraigned before a magistrate based on the alleged probation violations. (R., p.501.) On March 7, 2013, Mr. Ellis was terminated from the mental health court, in both cases. (R., p.502.) On March, 18, 2013, the State

filed, in both cases, a report of probation violation alleging that Mr. Ellis violated the terms of his probation for being terminated from mental health court, driving without privileges, and committing the offense of misdemeanor theft. (R., pp.503-506.) Three days after the report of probation was filed, Mr. Ellis made his first appearance before the district court at a hearing which was scheduled for a probation violation admit/deny or evidentiary hearing. (R., pp.538-541; 03/21/13 Tr., p.16, Ls.12-16.)

At the beginning of that hearing, Mr. Ellis' defense counsel requested a continuance in order to obtain an updated mental health report. (03/21/13 Tr., p.3, L.15 - p.4, L.3.) The district court found that this request was not credible and was merely a means to delay the proceedings. (03/21/13 Tr., p.6, Ls.10-14.) The district court also found, based on Mr. Ellis' admission, that he was competent to proceed. (03/21/13 Tr., p.6, L.14 - p.7, L.2.)

The district court then asked Mr. Ellis how he was going to plead to the first allegation contained in the report of probation violation filed three days earlier. (03/21/13 Tr., p.5, Ls.5-10; R., pp.503-506.) Mr. Ellis then said he wanted to retain counsel. (03/21/13 Tr., p.7, Ls.11-12.) The district court pointed out that Mr. Ellis had counsel, and again asked Mr. Ellis how he was going to plead. (03/21/13 Tr., p.7, Ls.13-14.) Mr. Ellis said that he was not prepared to go forward and that he had already spoken with a private attorney, John Redal. (03/21/13 Tr., p.7, Ls.15-17.) Mr. Ellis then said that Mr. Redal wanted Mr. Ellis to get the proceedings continued until April 8, 2013, which was approximately eighteen days later. (03/21/13 Tr., p.7, Ls.17-19.) The district court ruled that since the private attorney was not present, and since Mr. Ellis had an attorney, it was going to deny the motion for a continuance. (03/21/13 Tr., p.7, Ls.20-



22.) Mr. Ellis then denied two of the allegations, but admitted that he violated the terms of his probation by driving without privileges. (03/21/13 Tr., p.7, L.22 - p.8, L.17; R., pp.503-506.) The State then withdrew the one of the petit theft allegation and went forward to an evidentiary hearing on the allegation that Mr. Ellis was terminated from mental health court. (03/21/13 Tr., p.8, L.18 - p.9, L.4; R., pp.503-506.) The district court then found that Mr. Ellis violated the terms of his probation by being terminated from mental health court. (03/21/13 Tr., p.15, Ls.19-23; R., pp.503-506.)

After finding that Mr. Ellis had violated the terms of his probation, the district court asked both parties if they were prepared to go directly to the disposition of the probation violations. (03/21/13 Tr., p.15, L.23 - p.16, L.1.) Mr. Ellis' defense counsel said that he was not prepared to go forward with the disposition of the probation violations because he had three witnesses he wanted to call. (03/21/13 Tr., p.16, Ls.2-9.) The district court asked why the witnesses were not present and defense counsel said that he was not on notice that the court was going to hold a disposition hearing on the probation violations. (03/21/13 Tr., p.16, Ls.10-16.) Defense counsel also told the district court that he only needed one week to be prepared for a disposition hearing and that the presentation of witnesses' testimony would only take approximately one-half hour. (03/21/13 Tr., p.16, Ls.6-9.) The district court then asked defense counsel to provide an offer of proof as to the witnesses' potential testimony. (03/21/13 Tr., p.17, Ls.17-18.) Defense counsel said he was not quite sure what the testimony would be, but it would probably indicate that Mr. Ellis had not been drinking and driving. (03/21/13 Tr., p.16, L.19 - p.18, L.25.) Defense counsel then said Mr. Ellis would like to have his sponsor testify and his sponsor would say Mr. Ellis has been working a twelve-step program and

remained sober. (03/21/13 Tr., p.18, Ls.1-6.) The district court then asked the State to respond to Mr. Ellis' request for a continuance of the disposition hearing, and the State responded it had no position and would be available for the continued hearing. (03/21/13 Tr., p.17, Ls.9-12.) The district court then accepted defense counsel's offers of proof as true and denied Mr. Ellis' request for a continuance. (03/21/13 Tr., p.18, Ls.7-11.) The district court also noted that it would not consider any unproven allegations that Mr. Ellis had been drinking and driving. (03/21/13 Tr., p.18, Ls.11-19.) The district court revoked probation and executed the underlying sentences. (R., pp.543-544.) At the end of the disposition portion of the probation violation proceedings, the district court explained that it denied the request for a continuance for appointed counsel because it thought the request was a delay tactic. (03/21/13 Tr., p.49, Ls.8-14.) Mr. Ellis timely appealed. (R., pp.545-547.)

On appeal, Mr. Ellis argued that the district court abused its discretion when it denied his request for a continuance because it was supported by the timing of the request, Mr. Ellis' mental instability, and the short length of the requested continuance. (Appellant's Brief, pp.8-11.) Mr. Ellis provided further support for his motion for a continuance in order to retain private counsel by pointing out he had an absolute right to retain private counsel and that the erroneous denial of that right constitute structural error. (Appellant's Brief, pp.8-11; Reply Brief of Appellant, pp.3-9.) Mr. Ellis also argued that his right to procedural due process was denied because he was never put on notice that the March 21, 2013, admit/deny hearing was going to encompass the disposition portion of the probation violation revocation proceedings. (Appellant's Brief, pp.11-17.) Due to that error, Mr. Ellis also argued that his right to a meaningful

disposition hearing was denied because he was not afforded the opportunity to prepare a defense and to call witnesses on his behalf. (Appellant's Brief, pp.11-17.) Mr. Ellis also argued that the district court's decision to accept defense counsel's offer of proof as to Mr. Ellis' witnesses potential testimony was not an adequate remedy for the denial of the right to notice, to prepare a defense, and to call witnesses. (Appellant's Brief, pp.15-17.)

A majority of the Court of Appeals affirmed the district court's order revoking probation, reasoning that Mr. Ellis had previously displayed a pattern of delay in this matter and that the request for a continuance to retain private counsel was merely a delay tactic. (Opinion, pp.2-4.) The majority then held that even if the district court erred by failing to notify Mr. Ellis of the nature of the proceedings, the error was harmless because the district court would have revoked probation regardless of the witnesses' testimony. (Opinion, pp.4-6.) Judge Lansing did not join the majority and, instead, dissented without providing an explanation. (Opinion, p.6.) Mr. Ellis timely filed a petition for review.

### ISSUES

1. Should review be granted as the Idaho Court of Appeals' Opinion affirming Mr. Ellis' order revoking probation is inconsistent with precedent from the Idaho Supreme Court and the Idaho Court of Appeals?
2. Did the district court abuse its discretion when it denied Mr. Ellis' request for a continuance in order to retain private counsel?

## ARGUMENT

### I.

#### Review Should Be Granted As The Idaho Court of Appeals' Opinion Affirming Mr. Ellis' Order Revoking Probation Is Inconsistent With Precedent From The Idaho Supreme Court And The Idaho Court Of Appeals

##### A. Introduction

Review should be granted because a majority of the Idaho Court of Appeals and the district court approved of a procedure which functionally denied Mr. Ellis the procedural due process rights to notice, to prepare a defense, and to call witnesses during the disposition portion of Mr. Ellis' probation revocation proceedings. Mr. Ellis was never provided notice that the March 21, 2013, probation violation "admit/deny" hearing was going to include the disposition portion of the probation revocation proceedings. Instead of granting Mr. Ellis' request for a continuance to prepare a defense and to call witnesses, the district court accepted Mr. Ellis' defense counsel's offer of proof as to what he thought the witnesses might say if called to testify. A majority of the Court of Appeals held that this might have violated Mr. Ellis right to due process, but that the error was harmless because the proffered testimony would not have changed the district court's decision to revoke probation. Mr. Ellis argues that this was a flawed harmless analysis and that in order to establish prejudice Mr. Ellis only needed to inform the district court that he had witnesses whom would testify in a favorable and material manner, which he did.

B. Standards

The Idaho Appellate Rules provide that petitions for review may be granted only “when there are special and important reasons” for doing so, but, ultimately, the decision of whether to grant a given petition lies within the sound discretion of the Supreme Court. I.A.R. 118(b). This exercise of discretion is not completely unfettered though. Idaho Appellate Rule 118(b) provides a non-exhaustive list of five factors which must be considered in evaluating any petition for review:

- 1) Whether the Court of Appeals has decided an issue of first impression;
- 2) Whether the Court of Appeals’ decision is inconsistent with precedent from the Idaho Supreme Court or the United States Supreme Court;
- 3) Whether the Court of Appeals’ decision is inconsistent with its own prior decisions;
- 4) Whether the Court of Appeals’ actions are so unusual as to call for the Supreme Courts’ exercise of its supervisory authority; and
- 5) Whether a majority of the Court of Appeals has certified that further appellate review is desirable.

I.A.R. 118(b). Mr. Ellis argues that this Court should grant review because the Court of Appeals Opinion is inconsistent with precedent from this Court and its own precedent.

Issues of constitutional magnitude are reviewed *de novo*. *State v. Morton* 140 Idaho 235, 236 (2004). Idaho appellate courts defer to the trial court’s findings of fact unless they are not supported by substantial and competent evidence and are, therefore, clearly erroneous. *State v. Hoyle*, 140 Idaho 679, 682 (2004).

An abuse of discretion standard is used to determine whether a district court should have granted a request for a continuance. *State v. Ward*, 98 Idaho 571, 574 (1977). “When a district court’s discretionary decision is reviewed on appeal, the

appellate court conducts a multi-tiered inquiry to determine whether the lower court correctly perceived the issue as one of discretion, acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it, and reached its decision by an exercise of reason.” *State v. Knutsen*, 138 Idaho 918, 923 (Ct. App. 2003).

C. The District Court Denied Mr. Ellis Due Process When It Refused To Continue The Disposition Portion Of The Probation Revocation Hearing, Which Was Requested To Afford Mr. Ellis The Opportunity To Prepare A Defense And Call Witnesses To Testify On His Behalf

Generally, it has been held that unless an appellant shows that his substantial rights have been prejudiced by reason of a denial of his motion for continuance, appellate courts can only conclude that there was no abuse of discretion. *State v. Laws*, 94 Idaho 200, 202 (1971). A probationer is entitled to state and federal due process protections throughout the probation revocation proceedings. *State v. Kelsey*, 115 Idaho 311, 314 (1988). These due process protections include a right to notice and two hearings. *State v. Chapman*, 111 Idaho 149, 150-151 (1986). The first hearing is in the nature of a preliminary hearing and is to determine whether probable cause exists to find that the probationer violated a term of the probation agreement. *Id.* at 151. The second hearing is one to determine whether there was a probation violation and whether the probation violation justifies revocation of probation. *Id.* Additionally, a probationer has a due process right to prepare and present witnesses during the probation revocation proceedings. *Id.* Mr. Ellis argues that his substantial rights to due process were violated when the district court denied his request for a continuance of the probation violation disposition hearing.

The following events are the basis for Mr. Ellis' due process claims. After Mr. Ellis admitted to one of the probation violation allegations and the district court found that Mr. Ellis violated a term of his probation agreement, the district court asked the State if it was ready to proceed to the disposition of the probation violations and the State said it was prepared. (03/21/13 Tr., p.15, Ls.19-25.) When Mr. Ellis was asked the same question, the following dialogue occurred:

Defense Counsel: No, Your Honor. I would like the opportunity, in speaking with Mr. Ellis, to call a couple of witnesses on his behalf. Specifically, I'm thinking about calling his mother and his girlfriend. His mother's not here today. I have not been able to get a hold of her, and so I would ask the Court to set this out for next week. I can be prepared to go on Thursday and have my witnesses all lined up.

The Court: [W]hat is the reason why those witnesses aren't here today?

Defense Counsel: Well, Your Honor, this was just simply the admit/deny hearing on it, and he did deny. We went directly to evidentiary, and I guess at this point in time that's all I can let the Court know. They simply are not here.

The Court: All right. What, as an offer of proof, would these witnesses testify about?

(03/21/13 Tr., p.16, Ls.1-18.) Defense counsel noted that the State recommended prison and Mr. Ellis was going to request probation. (03/21/13 Tr., p.16, Ls.19-25.) Defense counsel then said that Mr. Ellis' mother and girlfriend would testify that Mr. Ellis has been doing well on probation and provided some other mitigating information. (03/21/13 Tr., p.17, Ls.1-9.) The district court asked the State what its position was as to the request for a one-week continuance, and the State said it had no opinion and would be available for the a disposition hearing the following week. (03/21/13 Tr., p.17,



Ls.9-12.) Defense counsel then said he anticipated that he would not need more than one-half hour to conduct the hearing. (03/21/13 Tr., p.17, Ls.13-14.)

The district court then asked defense counsel what Mr. Ellis' mother would specifically testify about. (03/21/13 Tr., p.17, Ls.15-16.) Defense counsel responded, "Well, your honor, I don't know. I'm assuming that she - - I'm not quite sure, to be honest with the Court. I think she can testify that he has lived with her and, . . . has seen him in the community." (03/21/13 Tr., p.17, Ls.17-20.) Defense counsel also said that she would rebut allegations that Mr. Ellis had been drinking and driving while on probation. (03/21/13 Tr., p.17, Ls.20-25.) Defense counsel then stated that Mr. Ellis wanted his sponsor to testify that Mr. Ellis was "clean and working the steps." (03/21/13 Tr., p.18, Ls.1-6.) The district court accepted the offers of proof as the truth and said it would not consider any unproven allegations that Mr. Ellis had been drinking and driving, it then denied the request for a continuance, and proceeded to disposition. (03/21/13 Tr., p.18, Ls.7-19.)

Mr. Ellis first argues that his due process rights were violated because he never received notice that the March 21, 2013 hearing, was going to include the disposition portion of the probation revocation proceedings. As stated above, probationers have a due process right to notice as to both the guilt phase and the disposition phase of the probation violation proceedings. *Chapman*, 111 Idaho at 151. According to defense counsel, Mr. Ellis was only put on notice that the March 21, 2013 hearing was scheduled for an admit/deny hearing, not a disposition hearing. (03/21/13 Tr., p.16, Ls.2-16.) It is also important to note that defense counsel requested a continuance as he was not prepared for disposition due to the lack of notice.

Based on the lack of notice, Mr. Ellis also argues that his due process rights were violated when the district court refused to grant the continuance to afford Mr. Ellis the opportunity to prepare a defense and call witnesses on his behalf. As mentioned above, a probationer has a due process right to prepare a defense and call witnesses during probation violation proceedings. *Morrissey v. Brewer*, 408 U.S. 471, 488-489 (1972). Even if a probationer is denied this right s/he must also establish prejudice, which requires the probationer to make a showing that the witnesses' testimony would have been material and favorable. *State v. Hanslovan*, 116 Idaho 266, 268 (Ct. App. 1989); see also *Bradford v. State*, 124 Idaho 788, 792 (Ct. App. 1993). In this case, the district court provided Mr. Ellis an opportunity to make the required showing and he complied with the requirement. (03/21/13 Tr., p.16, L.19 - p.18, L.6.) Specifically, he said he would call his mother and his sponsor and they would rebut any allegations that he was drinking and driving and that he was doing well on probation. (03/21/13 Tr., p.16, L.19 - p.18, L.6.) His sponsor would also testify he was working the steps of a rehabilitation program. (03/21/13 Tr., p.18, Ls.1-6.) This information is both material and favorable for Mr. Ellis, because when determining whether to revoke or continue probation, a district court must analyze the sentencing goals of protection of society and rehabilitation. *State v. Leach*, 135 Idaho 525, 529 (Ct. App. 2001). Mr. Ellis' offers of proof directly concern these two goals. As such, Mr. Ellis can establish that the district court's denial of his request for a continuance violated his due process right to call witnesses and that he was prejudiced because of that denial.

A majority of the Court of Appeals did not affirmatively hold that the district court denied Mr. Ellis both notice of the disposition portion of the probation revocation

proceedings and an opportunity to prepare a defense prior to the disposition portion of the probation revocation proceedings. (Opinion, pp.5-6.) Instead, a majority of the Court of Appeals held as follows:

Even if the district court erred by failing to notify [Mr. Ellis] of the nature of the proceedings, it was irreversible harmless error because [Mr. Ellis] was not prejudiced by the absence of witnesses. The district court was clear that its decision to revoke [Mr. Ellis'] probation and impose the previously suspended sentences was based entirely upon public safety concerns. The district court described [Mr. Ellis'] considerable history of DUIs and driving without privileges and explained that [Mr. Ellis'] sentences were being imposed because [Mr. Ellis'] admittedly drove without privileges. [Mr. Ellis'] offer of proof, which was accepted by the district court, provided no evidence that he was not a public safety concern, except [Mr. Ellis'] mother's opinion on the matter. Thus, even if the witnesses had been available and testified according to [Mr. Ellis'] offer of proof, [Mr. Ellis] has failed to show that the testimonies would have had any effect on the district court's decision, which was made having accepted the offer of proof as evidence and having taken the evidence into consideration when the district court made its ruling.

(Opinion, pp.5-6.) The majority's decision to affirm the district court on the foregoing basis has allowed the district court to circumvent the due process rights mandated by *Morrissey* and *Chapman, supra*. The notion that a probationer has a due process right to call witnesses becomes meaningless if a trial court only needs to ask the probationer what the witnesses would say, then accept the offers of proof as the truth and deny the probationer an opportunity to call the witnesses.

Moreover, the Court of Appeals did not apply the correct harmless standard when evaluating Mr. Ellis' specific claim that he was denied the right to call witnesses. As mentioned above, when dealing with a claim that a defendant was denied the right to call witnesses in order to establish reversible prejudice, the defendant need only establish that the witnesses' potential testimony was favorable and material. *Hanslovan*, 116 Idaho at 268. Absent such a standard, there would be no remedy for a

violation of the right to call witnesses because a trial court could always prevent appellate review of a claim that the defendant was denied the right to call witnesses by doing what the district court did in this matter, *to wit*, request an offer of proof as to the witnesses' testimony and then rule against the defendant. This procedure seems at odds with the general rule that all rights must have a remedy. See *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.") (quoting William Blackstone, *Commentaries* (3d vol. \*23)). Moreover, the use of defense counsel's summary of Mr. Ellis' witnesses' potential testimony was a poor substitute for their actual testimony, as "[e]vidence . . . has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of [the finder of fact] to draw the inferences, whatever they may be, necessary to reach an honest [conclusion]." *Old Chief v. United States*, 519 U.S. 172, 187 (1997).

Mr. Ellis further argues that the denial of his request for a continuance was arbitrary. The request for the continuance was only for a week-long delay, and the State had no objection and said it was available for the hearing. (03/21/13 Tr., p.16, Ls.6-9, p.17, L.9-14.) While the district court provided a reason why it denied the request for a continuance for Mr. Ellis' updated mental health report and his request for counsel (03/21/13 Tr., p.5, L.20 -p.7, L.10, p.49, Ls.8-17), there was no expressed rationale provided by the district court for denying his request for a continuance of the disposition portion of the probation proceedings, other than the district court's acceptance of Mr. Ellis' offers of proof as to the content of his witnesses' testimony.

However, that rationale, as argued above, is circular and denied him a remedy for a denial of his right to call witnesses. As such, due to the district court's lack of an explanation for denying Mr. Ellis request for a continuance and due to the State's lack of an objection, the district court's denial of a request for a continuance was unreasoned and arbitrary.

Review should be granted because Mr. Ellis was not put on notice that the March 21, 2013 hearing, was going to include the disposition portion of the probation revocation proceedings and, due to that lack of notice, he was not able to prepare a defense and call witnesses during that portion of the proceedings. The district court provided no rationale for its decision to deny this specific request for a continuance and the State did not object to the continuance. Even worse, a majority of the Court of Appeals approved of a procedure which undermines the main due process concerns identified in *Morrissey*. See *State v. Hass*, 114 Idaho 554, 557 (Ct. App. 1988) ("The pertinent objective of the procedural safeguards of *Morrissey* . . . is the minimization of surprise so a parolee or probationer may prepare a meaningful defense."). As such, review should be granted because a majority of the Court of Appeals affirmed the district court's unreasoned and arbitrary decision to deny Mr. Ellis the right to notice, to prepare a defense, and to call witnesses on his behalf.

## II.

### The District Court Abused Its Discretion When It Denied Mr. Ellis' Request For A Continuance In Order To Retain Private Counsel

#### A. Introduction

Mr. Ellis argues that the Court of Appeals erred when it affirmed the district court's denial of his request for a continuance in order to retain private counsel. This is reversible error because the erroneous denial of the right to retain private counsel constitutes structural error. Moreover, the district court's determination that Mr. Ellis was delaying the proceedings was based on an unconstitutional premise, as the district court should not have prejudiced Mr. Ellis for exercising his constitutional rights to hire private counsel.

#### B. Standards

The standards governing this Court's decision to grant a petition for review and the applicable standards of review were previously articulated in Section I(B), *supra*, and are incorporated herein by reference thereto.

#### C. The District Court Abused Its Discretion When It Denied Mr. Ellis' Request For A Continuance In Order For Him To Retain Private Counsel

Generally, it has been held that unless an appellant shows that his substantial rights have been prejudiced by reason of a denial of his motion for continuance, appellate courts can only conclude that there was no abuse of discretion. *State v. Laws*, 94 Idaho 200, 202 (1971). The Idaho Supreme Court has held that "probationers have an unqualified federal due process right to retained counsel at probation revocation hearings . . . ." *State v. Young*, 122 Idaho 278, 283 (1992); *see also United*

*States v. Gonzalez-Lopez*, 540 U.S. 140, 150 (2006) (“We have little trouble concluding that erroneous deprivation of the right to counsel of choice, ‘with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.’”) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)). However, “[t]rial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons.” *State v. Cagle*, 126 Idaho 794, 797 (Ct. App. 1995). “[O]nly an unreasoning and arbitrary ‘insistence upon expeditiousness in the face of a justifiable request for delay’ violates the right to assistance of counsel.” *State v. Carman*, 114 Idaho 791, 793 (Ct. App. 1988) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)). “Therefore, a request for new counsel should be examined with the rights and interests of the defendant in mind, tempered by exigencies of judicial economy.” *Id.* Idaho appellate courts analyze the following factors when evaluating a district court’s order denying a request for a continuance in order to obtain substitute counsel:

[T]he timing of the motion; the requested length of delay, including whether the delay is an attempt to manipulate the proceedings; the number, if any, of similar continuances sought by the defendant; inconvenience to witnesses; any prejudice to the prosecution; whether an irreconcilable conflict exists between the accused and counsel; and the qualifications possessed by present counsel.

*Cagle*, 126 Idaho at 797. An application of the foregoing factors leads to the conclusion that the district court abused its discretion when it denied Mr. Ellis’ request for a continuance in regard to his request for counsel.

The district court and a majority of the Court of Appeals both determined that the denial of Mr. Ellis’ motion for a continuance to retain private counsel was justified

because of an alleged pattern of delay he exhibited during the prior proceedings. (03/21/13 Tr., p.49, Ls.12-14; Opinion, pp.3-4.) At the end of the disposition portion of the probation violation hearing, the district court made the following ruling:

[Y]our claim today that you wanted to hire John Redal, who's a fine attorney, I find so reprehensible; doesn't have anything to do with my decision, but the best attorney you've ever had is seated to your left. Your claim that you wanted John Redal today was made nothing -- for no other reason than to create delay. That's my specific finding. Somebody has paid a lot of money for a variety of different attorneys over the last seven years to come into court and delay things for Jerry Ellis.

(03/21/13 Tr., p.49, Ls.8-17.) Mr. Ellis responded "It was me, Your Honor." (03/21/13 Tr., p.49, L.18.) The district court then stated, "That's fine. It's money down the rat hole." (03/21/13 Tr., p.49, Ls.19-20.)

The Court of Appeals' decision to affirm this ruling is flawed because it is unconstitutional for a district court to punish or otherwise prejudice Mr. Ellis for exercising his right to hire private counsel. See *United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'") (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)); see also *Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33 n.20 (1973) (holding that it is "patently unconstitutional" for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969)).

There are factors which were not analyzed by the Court of Appeals which support Mr. Ellis' motion for a continuance. Specifically, the timing of the motion in this matter supports Mr. Ellis' position. Mr. Ellis recognizes that his motion for the continuance occurred on the day of his probation violation hearing. (03/21/13 Tr., p.3,



Ls.1-20.) However, there was very little time in this matter for Mr. Ellis to prepare for that hearing, because the report of the probation violations which contained the official allegations against Mr. Ellis was filed on March 18, 2013, and the probation violation hearing was held three days later on March 21, 2013. (03/21/13 Tr., p.3, Ls.1-20.)

Mr. Ellis' ability to prepare for this hearing was impeded by his unstable mental health condition. (03/21/13 Tr., p.5, Ls.16-19.) Specifically, defense counsel told the district court that Mr. Ellis was "extremely overwhelmed" at the hearing and that he had made a request with his medical provider, Dr. Rhodes, months before the probation hearing in order to get his medications changed. (03/21/13 Tr., p.3, L.15 - p.4, L.3.)

Mr. Ellis' claims that he was mentally unstable are credible, as he was previously deemed a viable candidate for mental health court. (R., pp.415-435, 469-500; PSI, p.140.) During the hearing, the district court also found that Mr. Ellis' claims that he was not stable on his medications was not credible because it was the first time in three years he had heard such a claim. (03/21/13 Tr., p.48, Ls.3-6.) However, at the July 19, 2010, mental health court hearing, Mr. Ellis claimed his medications were outdated. (R., p.472.) At the December 13, 2012 hearing, he was not taking his medications. (R., p.490.)

The length of the delay and the State's prejudice are not significant factors in this matter. Mr. Ellis only requested an eighteen-day delay. (03/21/13 Tr., p.7, Ls.15-19.) Mr. Ellis had already communicated with private counsel about the eighteen-day delay, which ensured that private counsel would make an appearance for Mr. Ellis. (03/21/13 Tr., p.7, Ls.15-19.) When asked about the continuance in regard to the updated mental health evaluation, the State did not object to a continuance, which evinces a lack of

perceived prejudice by the State. (03/21/13 Tr., p.4, L.21 - p.5, L.6.) Additionally, this was a probation hearing so there was no jury empanelled at the time of the request for the continuance. (03/21/13 Tr., p.3, Ls.1-11.) The State only called two witnesses at the evidentiary portion of the hearing. (03/21/13 Tr., p.8, L.1 - p.14, L.18.) Additionally, this was the first request for a continuance. (R., pp.501-502, 538.)

In sum, Mr. Ellis only had three days between the filing of the report of his alleged probation violations and the probation revocation hearing. Mr. Ellis told the district court that he was not mentally stable enough to go forward with the proceedings and needed a continuance in order to be represented by retained counsel. Only at the end of the disposition portion of the proceedings did the district court explain that it thought the request for a continuance to retain substitute counsel was a delay tactic. However, that concern is far outweighed by Mr. Ellis' right to retained counsel, the denial of which constitutes structural error.

### CONCLUSION

Mr. Ellis respectfully requests that this Court grant review. In the event this Court grants review, Mr. Ellis respectfully requests that this Court remand this matter for further proceedings.

DATED this 10<sup>th</sup> day of December, 2014.

A handwritten signature in black ink, appearing to read 'SHAWN F. WILKERSON', written over a horizontal line.

SHAWN F. WILKERSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10<sup>th</sup> day of December, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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E-MAILED BRIEF

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